

**UNITED STATES OF AMERICA**

**MERIT SYSTEMS PROTECTION BOARD**

**v.**

DATE: MAY 21 1985

Herbert E. Ellingwood, Chairman  
Maria L. Johnson, Vice Chair  
Dennis M. Devaney, Member

The agency removed appellant, a Psychiatric Nursing Assistant, for tardiness, absence without leave, insubordination, and improper conduct. Appellant petitioned the Board's New York Regional Office for appeal of the removal. Neither appellant nor his representative, however, appeared for the hearing on his appeal or responded to the presiding official's order to show cause why appellant's absence should be excused. Therefore, the presiding official dismissed the appeal for lack of prosecution.

In his petition for review, appellant contends that he failed to appear because the public transportation broke down and he could not find the hearing room. He has not, however, substantiated his contention with any evidence. Moreover, in its response to the show cause order, the agency stated that appellant notified it from his home that he had missed his bus and could not make the hearing. We do not find, therefore, that appellant has shown his failure to appear at the hearing was excusable. See Callahan v. Department of the Navy, 748 F.2d 1556, 1557-58 (Fed. Cir. 1984).

We find, however, that the presiding official misinterpreted Callahan, supra, in dismissing appellant's petition for appeal without deciding the merits of the appeal on the written record. See Callahan, supra, at 1556. Since the agency's administrative record is before us, we will resolve this appeal on that record rather than remand the case to the Regional Office. See Best v. United States Postal Service, MSPB Docket No. NY07528410075REM at 2 (February 20, 1985). Accordingly, appellant's petition for review is GRANTED to determine whether the agency proved the charges against him by a preponderance of the evidence. 5 U.S.C. § 7701(e).

In its notice of proposed removal, the agency set forth fourteen charges of unauthorized absence, tardiness, and insubordination against appellant. After considering appellant's oral reply to the notice and a prior admonishment appellant had received for absence without leave, the agency sustained all of the charges and removed appellant effective October 12, 1984. Agency File, Tabs 26 and 27.

We find that the agency properly sustained the charges against appellant. The agency submitted memoranda from appellant's supervisor, Judith Lovelace, detailing each instance of unauthorized absence, tardiness, and insubordination. See Agency File, Tabs 3-10, 12-19, 21. The time and attendance records submitted by the agency support Ms. Lovelace's documentation of appellant's tardiness and absences without leave. See Agency File, Tab 22. Statements by other agency employees also support Ms. Lovelace's report of appellant's improper conduct. See Agency File, Tabs 11 and 20.

Appellant has denied only the charges dealing with improper conduct. He has presented no evidence, however, to support this general denial. Further, although appellant

contends that his absences from July 31, 1984, through August 6, 1984, were caused by illness which he substantiated with a medical certificate, we find that the agency could properly deem the information insufficient to excuse appellant's absences. The doctor's letter, dated September 14, 1984, stated in full, "Please be advised that Richard Roberson was seen in my office on 8/7/84 for adenitis. He was out of work since 7/27/84 and was able to return to work on August 8, 1984." See Appellant's Response, Tab 7. The agency could properly conclude that the letter did not establish that appellant was incapacitated during this time by illness justifying his absence from work. See, e.g., Rison v. Department of the Navy, 23 MSPR 118, 124 (1984); Staten v. United States Postal Service, MSPB Docket No. NY07528310396 at 2 (July 17, 1984). Moreover, although appellant asserts that his absence on September 2, 1984, was also due to illness, he has not submitted any medical certificate to support his assertion.

Appellant attributes several of his other attendance problems to a change in his work schedule which, he alleges, caused him transportation difficulties. However, in devising its work schedule, the agency is not obligated to accommodate appellant's transportation problems. See Kelsey v. Government of the District of Columbia, 7 MSPB 266, 267 (1981); Leonard v. United States Postal Service, 3 MSPB 251, 252 (1980). Appellant has presented no evidence to excuse his failure to timely report for work. Although he submitted a statement from a co-worker, Sharon Allen, concerning his tardiness on one day, the submission does not give any acceptable reason for the tardiness. Ms. Allen merely stated that she informed the agency that appellant was riding with her on that day and that she would be late for work. See Appellant's Response, Tab 3.

Appellant also asserts, in essence, that the agency committed harmful procedural error by improperly counseling him, apparently by counseling him in front of another employee, and by interrupting the preparation for his oral reply. Appellant has the burden of proving that any procedural error by the agency harmed him. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(b)(1); Parker v. Defense Logistics Agency, 1 MSPB 489, 492 (1980). Appellant has not shown any harm from the alleged improper counseling. Further, appellant was represented at the oral hearing by Thomas Clemmons. Although, at that time, Mr. Clemmons alluded to the interruption, he did not contend that it harmed appellant. See Agency File, Tab 25.

Finally, appellant contends that the agency improperly applied the table of penalties in failing to impose progressive discipline. He argues that the agency should not have removed him since he had previously been admonished only for two instances of unauthorized absence. See Agency File, Tab 2. We do not find that the agency erred in this regard. Ms. Lovelace noted that she had proposed lesser penalties but that appellant's continued unauthorized absences caused her to increase the penalties before they could be imposed. Further, the table of penalties lists removal as an appropriate maximum penalty for a first offense for insubordination and disrespectful conduct. See Agency File, Tab 28. In addition, Ms. Lovelace stated that she tried to counsel appellant, indicating that appellant should have known the seriousness of his offenses. See Agency File, Tabs 6 and 9. Further, an agency's use of warnings and counselings rather than formal disciplinary action does not preclude the agency from removing an employee when it becomes clear that his performance will not improve. See Bias v. Equal Employment Opportunity Commission, MSPB Docket No. PH07528110717 at 3 (April 2, 1984).

Moreover, we find that removal is an appropriate penalty and promotes the efficiency of the service in this case. Unauthorized absence from duty is a proper ground for removal since by its very nature it disrupts the efficiency of the service. Desiderio v. Department of the Navy, 4 MSPB 171 (1980). An agency is entitled to require its employees to be present for work on time. Ritter v. Department of Transportation, 7 MSPB 33, 34 (1981). In addition, an agency is entitled to employee respect for agency rules and regulations relating to attendance and authorized absences, to employee respect for supervisors' authority, and to employee conformity to accepted standards of conduct. Abusive language and disrespectful behavior are not acceptable conduct and are not conducive to a stable working atmosphere. Therefore, they constitute just cause for removal. See Ritter, supra at 34; Hubble v. Department of Justice, 6 MSPB 553, 554 (1981). The record does not present any factors that warrant mitigating the penalty. Although the record does not suggest that appellant's work was unsatisfactory, it shows that his offenses were serious and repetitive; that he had worked for the agency for less than five years; and that improvement in his attendance and conduct in the future would be unlikely. Therefore, we find that removal is within the bounds of reasonableness. See Douglas v. Veterans Administration, 5 MSPB 313, 332 (1981).

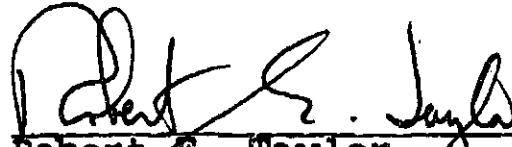
Accordingly, the initial decision is VACATED, and the agency removal action is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has

jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.